

PUBLIC NOTICE AND REQUEST FOR COMMENTS

Waiver of State Finance Law § 163-c Buy American Requirements for Zero Emission Vehicles and Electric Vehicle Chargers

PLEASE TAKE NOTICE that the Commissioner of General Services is considering a waiver of the Buy American contracting requirements for State agencies as authorized by State Finance Law § 163-c(1)(b). The proposed waiver is based on a determination that such requirements would not be in the public interest and would result in unreasonable costs and because zero emission vehicles and charging or fueling infrastructure components and parts cannot be produced, made, or assembled in the United States, its territories or possessions, in the coming year, in sufficient and reasonably available quantities. The waiver would be effective during the calendar year 2024.

Comments regarding this proposed waiver must be submitted via e-mail to: sustainability@ogs.ny.gov **no later than 5 p.m. ET on December 15, 2023.**

Summary

New York State has set ambitious climate goals. Environmental Conservation Law (“ECL”) § 19-0306-b states that “[i]t shall be a goal of the state that one hundred percent of new passenger cars and trucks offered for sale or lease, or sold, or leased, for registration in the state shall be zero-emissions by [2035],” and that 100% of medium- and heavy-duty vehicles sold or leased in New York shall be zero-emissions by 2045. State Finance Law (“SFL”) § 163-d requires that all State agency light-duty non-emergency vehicles shall be zero emission vehicles (“ZEVs”) by 2035 and all State agency medium- and heavy-duty vehicles shall be ZEVs by 2040, unless a ZEV is not feasible for a particular application.

SFL § 163-c requires that ZEVs and charging infrastructure procured by State agencies meet certain Buy American standards, but that after an annual review, these requirements may be waived by the Commissioner of General Services upon making certain findings and determinations. The Commissioner of General Services is proposing to issue such a waiver for the 2024 calendar year based upon the lack of available ZEVs and charging infrastructure (“EVSE”) that meet these requirements and that are practicable for purchase and use by State agencies, as well as cost increases. Based on these findings, the Commissioner of General Services has made a preliminary determination that a waiver would be in the public interest.

Legal requirements of SFL § 163-c

SFL § 163-c(1)(a) provides that

[e]ach state agency shall include requirements in any procurement for the purchase or lease of zero emission vehicles and charging or fueling infrastructure that the components and parts used or supplied in the performance of the contract or any subcontract thereto shall be produced

or made in whole or substantial part in the United States, its territories or possessions, and that final assembly of the zero emission vehicles and charging or fueling infrastructure shall occur in the United States, its territories or possessions.

SFL § 163-c(1)(b) provides that the Commissioner of General Services (the “Commissioner”), in consultation with the New York State Energy Research and Development Authority (“NYSERDA”), may waive the contracting requirements if the Commissioner determines that:

- (i) the requirements would not be in the public interest;
- (ii) the requirements would result in unreasonable costs; or,
- (iii) obtaining such ZEVs and charging or fueling infrastructure components and parts in the United States, its territories, or possessions (the “US”), would increase the cost of a contract for ZEVs and charging or fueling infrastructure by an unreasonable amount; or,
- (iv) ZEVs and charging or fueling infrastructure components and parts cannot be produced, made, or assembled in the US “in sufficient and reasonably available quantities or of satisfactory quality.”

Other State agency and authority directives

In September 2020, Governor Hochul issued Executive Order No. 22: Leading by Example: Directing State Agencies to Adopt a Sustainability and Decarbonization Program (“EO #22”). There are 75 Affected Entities subject to EO #22, many of which are State agencies. The EO sets forth the target that the light-duty and medium- and heavy-duty State fleet vehicles will be comprised of entirely ZEVs by 2035 and 2040, respectively.

Demand for zero emission vehicles

Demand across the US and worldwide is constantly growing for parts and components for ZEVs. There are thousands of vehicle components—including complex equipment such as batteries, sensors, computers, and semiconductors—that require global sourcing. Essential components in semiconductors, advanced power electronics, printed circuit boards, liquid crystal displays, relays, contactors, and other specialty parts are not readily manufactured in the United States or available in the quantities needed to support the scale of demand for ZEVs.

For ZEVs, the leading battery technology is expected to be lithium based, which offers high energy, high power, and long lifetimes compared to other currently available battery systems. ZEVs are a critical driver of the demand for lithium-ion batteries and are the primary market focus when outlining the need for domestic lithium-ion battery manufacturing. Of the 747 GWh of global ZEV lithium-ion cell manufacturing in 2020, the US capacity was approximately 8% (about 59 GWh). Global cell manufacturing for ZEVs is anticipated to grow to 2,492 GWh by 2025 (with China’s capacity about 73%) and US capacity expected to grow to 224 GWh (about 9%). However, demand from US annual sales of passenger ZEVs alone is projected to surpass this anticipated 224 GWh of US lithium-ion cell

manufacturing capability in 2025.¹ The challenges to creating a competitive and sustainable battery manufacturing industry in the US are significant, particularly in the short term. Other countries have developed vertical battery manufacturing supply chains supported by their own national strategies, such as China's "Made in China 2025" strategy released in May 2015 and the European Union's "Strategic Action Plan on Batteries," released in May 2018.²

Evaluation of ZEV availability for NYS agencies

The Buy American requirements of SFL § 163-c are similar to (although not completely aligned with) the eligibility requirements for tax credits for ZEVs under the Inflation Reduction Act ("IRA"). The IRA offers up to \$7,500 in tax credits for light- and medium-duty ZEVs assembled in North America that meet two requirements, with each of these requirements accounting for half, or \$3,750, of the total possible tax credit. These requirements establish minimum percentages of battery components and critical minerals that must be sourced in North America. Since SFL § 163-c is more restrictive regarding both measures, if either of these requirements is not met by a ZEV for the IRA tax credit, it would follow that the particular ZEV would not meet the Buy American requirements of SFL § 163-c. Notably, the IRA places no such restrictions on heavy-duty ZEVs to be eligible for its equivalent tax credit, likely due to the already extremely limited number of heavy-duty ZEVs available on the market.

ZEV Models Eligible for IRA Tax Credits

Make and Model (All Electric)	MSRP Limit	Tax Credit Amount
CADILLAC (GM)		
Lyriq (2023-2024)	\$80,000	Up to \$7,500
CHEVROLET (GM)		
Blazer EV (2024)	\$80,000	Up to \$7,500
Bolt EUV (2022-2023)	\$55,000	Up to \$7,500
Bolt EV (2022-2023)	\$55,000	Up to \$7,500
Equinox EV (2024)	\$80,000	Up to \$7,500
Silverado EV (2024)	\$80,000	Up to \$7,500
FORD		
F-150 Lightning (2022-2023)	\$80,000	Up to \$7,500
Mustang Mach-E (2022-2023)	\$80,000	Up to \$3,750

¹ [National Blueprint for Lithium Batteries 2021-2030 \(energy.gov\)](#) pg. 12

² [National Blueprint for Lithium Batteries 2021-2030 \(energy.gov\)](#) pg. 10

Make and Model (All Electric)	MSRP Limit	Tax Credit Amount
E-Transit (2022-2023)	\$80,000	Up to \$3,750
NISSAN		
LEAF S (2024)	\$55,000	Up to \$3,750
LEAF SV PLUS (2024)	\$55,000	Up to \$3,750
RIVIAN		
R1T (2022-2023)	\$80,000	Up to \$3,750
R1S (2022-2023)	\$80,000	Up to \$3,750
TESLA		
Model 3 Standard Range RWD/Long Range (2022-2023)	\$55,000	Up to \$7,500
Model 3 Long Range AWD (2023)	\$55,000	Up to \$7,500
Model 3 Performance (2022-2023)	\$55,000	Up to \$7,500
Model X Long Range (2023)	\$80,000	Up to \$7,500
Model Y RWD (2023)	\$80,000	Up to \$7,500
Model Y AWD/Long Range/Performance (2022- 2023)	\$80,000	Up to \$7,500
VOLKSWAGEN		
ID.4 / ID.4 S (2023)	\$80,000	Up to \$7,500
ID.4 Pro/Pro S/Pro S Plus (2023)	\$80,000	Up to \$7,500
ID.4 AWD Pro/AWD Pro S/AWD Pro S Plus (2023)	\$80,000	Up to \$7,500

Make and Model (Plug-in Hybrid)	MSRP Limit	Tax Credit Amount
BMW		
X5 xDrive50e (2024)	\$80,000	Up to \$3,750
CHRYSLER		
Pacifica Plug-in Hybrid (2022-2024)	\$80,000	Up to \$7,500

Make and Model (Plug-in Hybrid)	MSRP Limit	Tax Credit Amount
FORD		
Escape Plug-in Hybrid (2022-2023)	\$80,000	Up to \$3,750
JEEP		
Grand Cherokee 4xe (2022-2024)	\$80,000	Up to \$3,750
Wrangler 4xe (2022-2024)	\$80,000	Up to \$3,750
LINCOLN		
Aviator Grand Touring (2022-2023)	\$80,000	Up to \$7,500
Corsair Grand Touring (2022-2023)	\$80,000	Up to \$3,750

The table above illustrates the list of ZEVs eligible for the IRA tax credit and includes 29 models.³ Nine of those ZEVs are not readily able to be procured by NYS agencies because manufacturers of those ZEVs—including Tesla, Rivian, and BMW—are not on NYS centralized contract. Eight more of the ZEVs would be ineligible to be procured by State agencies because they do not meet either one or the other of the two IRA tax credit requirements, which means the vehicle would not meet the Buy American requirements of SFL § 163-c. Based on this review, the eligible ZEVs are limited to just 12 models if SFL § 163-c is not waived for 2024, and that is only if final assembly of those 12 models occurs in the US.

NYS agency needs, current procurement options, and implications

Of the 12 models that could potentially be eligible under SFL § 163-c, there is little diversity in the utility of these ZEVs, as a majority of them are small SUVs. For example, New York State's executive agency fleet is comprised of around 16,000 light-duty vehicles, around 38% (a plurality) of which are large vans, including cargo vans. If the waiver is not implemented, the only ZEV cargo vans available on State contract (Ford E-Transit, GM BrightDrop Zevo 400 and 600) will become ineligible for State agencies to purchase. There is only one minivan ZEV model available on State contract currently (Chrysler Pacifica Plug-in Hybrid), but that model is assembled in Canada and would thus be ineligible for State agencies to purchase without a waiver from the Buy American requirements of SFL § 163-c.

Even among the small vehicles, there would only be, at most, seven ZEV models available for State agencies to purchase⁴ (assuming all are fully assembled in the US) compared to the approximately 30 small ZEVs currently offered on the State contract without a waiver from the SFL § 163-c requirements. One of those

³ Current as of 11/7/23

⁴ These models are the Cadillac Lyriq; Chevy Bolt EUV, Bolt EV, and Equinox EV; and Volkswagen ID.4, ID.4 Pro, and ID.4 AWD Pro.

seven would be prohibitively expensive for many agencies, with a base MSRP above \$60,000, as it is from the luxury brand Cadillac, which rarely, if ever, is purchased as a NYS fleet vehicle. The Buy American requirements would severely impair the ability of State agencies to find available ZEVs to procure in time to meet the ambitious statewide goals outlined in SFL § 163-d and EO #22. The ZEV models from many manufacturers would be ineligible for purchase without a waiver from the Buy American requirements, and these are the manufacturers that currently supply the majority of ZEV models on State contract including Nissan, Toyota, Hyundai, Honda, Kia, Subaru, and Mitsubishi. Moreover, the society-wide goals set forth in ECL § 19-0306-b put State agencies in competition with New York consumers and all other buyers for a limited supply of ZEVs.

Electric vehicle supply equipment

State Finance Law § 163-c also requires that State agencies include a Buy American requirement in the purchase or lease of electric vehicle supply equipment ("EVSE"), which is commonly called charging stations or charging infrastructure. EVSE is the equipment necessary to charge the batteries of ZEVs.

There are four methods by which State agencies are currently or soon will be able to procure EVSE: (i) as a project through the New York Power Authority ("NYPA"), (ii) as a project using the Office of General Services ("OGS") Design & Construction unit-price contract, (iii) using the Sourcwell piggyback contract, or (iv) through an individual agency procurement process. The last two of those options should be considered insubstantial in terms of how EVSE procurement can occur at a large scale for the State fleet. The Sourcwell contract is still in negotiations, so we cannot be certain which vendors and models will be available and when. The individual agency bid process is one that OGS is actively discouraging in order to maintain consistency and centralization of the EVSE network across the State fleet.

NYS Fleet Charging Infrastructure Rollout - SFL 163-c EVSE Evaluation

Updated 10/27/2023

Manufacturer	Model Series	Type	SFL 163-c compliant	Buy America-compliant	Compatible with EV Connect	NYSERDA Charge Ready 2.0 Eligible	Notes
ABB	Terra AC Wallbox UL	L2	N	N	Y	N	
Autel	Maxicharger AC Wallbox	L2	N	N	N	Y	Manufacturer is not able to meet Buy America requirements until Q3 2024
Blink	Series 7 Plus	L2	Y	Y	N	Y	EV Connect will not support networking on Blink equipment
BTC	L2 Max	L2	Y	Y	Y	Y	SFL 163-c compliant equipment is not available until Q2 2024
Juicebar	Gen 3 series	L2	Y	Y	Y	N	All components are made & assembled in US other than the controller unit.
PowerCharge	Energy Series	L2	N	N	Y	N	
Zerova	AX series	L2	N	N	Y	Y	

Between the two remaining contracts, the above table represents NYPA's offerings, which will encompass over half of the State's EVSE purchases for its fleet. These contracts are the mechanism by which the OGS ZEV conversion funding is able to be used for other agencies. NYPA provided the above table when asked to evaluate the feasibility of using its contract if the Buy American

requirements of SFL § 163-c were in effect. There are seven models of chargers available through the NYPA contract that are generally supported by EV Connect, the existing network service provider, but only three of those would meet the Buy American requirement of SFL § 163-c. All three of those options cost more than non-compliant equivalent chargers, with the price increase ranging from approximately 50% more to 200% more than non-compliant chargers. Beyond the cost, two of the chargers will not even be compliant and available until Q2 and Q3 2024, at the earliest. NYPA did not find a cost-competitive EVSE model on the market that met both OGS specifications and SFL 163-c requirements, meaning there are not reasonable quantities, and it would increase the cost of a contract by an unreasonable amount.

Conclusion

There is currently an insufficient supply of parts and components to produce and assemble ZEVs in the US in whole or substantial part. Key parts and components (e.g., lithium batteries) are mostly manufactured outside of the US. The above findings demonstrate that the Buy American requirements of SFL § 163-c would severely hamper State agencies' ability to meet the statutorily mandated goals set forth in SFL § 163-d as well as Governor Hochul's EO #22. Similarly, without the waiver of the Buy American requirements of SFL § 163-c, the State's ability to procure and install the necessary EVSE would be extremely restricted and result in an unreasonable cost increase, neither of which would be in the public interest. Each year, a new evaluation of market availability will be made to determine if a waiver is appropriate. For calendar year 2024, such a waiver is necessary given the ZEV transition goals for the State fleet and current minimal availability of ZEVs and EVSE that both meet the requirements of the law and are available on agency contracts.

For the foregoing reasons, the Commissioner of General Services is considering issuing a waiver of the Buy American requirement pursuant to State Finance Law § 163-c(1)(b) with respect State agency procurement of both ZEVs and EVSE for the calendar year 2024 because compliance with the Buy American requirement would not be in the public interest and would result in unreasonable costs and because ZEVs and EVSE components and parts cannot be produced, made, or assembled in the US in sufficient and reasonably available quantities.